No. 86-1281

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

QUME CORPORATION,

Petitioner,

vs.

UNITED STATES INTERNATIONAL TRADE COMMISSION,

—and—

TRIUMPH-ADLER AKTIENGESELLSCHAFT, ADLER-ROYAL BUSINESS MACHINES, INC., NAKAJIMA ALL CO., LTD., SHARP ELECTRONICS CORPORATION and SHARP CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOHN E. KIDD
(Counsel of Record)
JOHN E. DANIEL
NICHOLAS L. COCH
ANDERSON RUSSELL KILL & OLICK, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700

Attorneys for Petitioner Qume Corporation

Of Counsel:
RALPH S. SPRITZER
College of Law
Arizona State University
Tempe, Arizona 85287
(602) 965-7419

and

MICHAEL J. CRONIN
25 Fox Hedge Road
Colts Neck, New Jersey 07722
(201) 946-3277

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Private respondents and the International Trade Commission have sidestepped the basic argument raised by Qume in Point I of its Petition – namely, that where a divided Commission has reversed an ALJ's findings, and the issues on appeal from the Commission involve a review of factual findings, the appellate review must satisfy the mandate of *Universal Camera* 340 U.S. 474 (1951) and hence must go well beyond the perfunctory review engaged in by the Court of Appeals for the Federal Circuit ("CAFC") in this case.[1] In its Petition,

[1] Private respondents also totally ignore Qume's Point II - that the CAFC further failed to utilize the correct standard of appellate review because it did not incorporate the "clear and convincing" evidentiary standard in its

(Footnote Continued)

Qume cited five ways in which the CAFC's review was deficient under *Universal Camera* (Petition at 15-16). Respondents ignore this critique and, instead, mischaracterize Qume's argument as a mere technical objection to the CAFC's failure to cite *Universal Camera* in its opinion. Qume's argument, however, is far more substantial; Qume contends it was the CAFC's failure to *apply* the criteria of *Universal Camera* that calls for correction by this Court.

Respondents also note that the CAFC was only required to review the Commission's decision, rather than the ALJ's findings. This does not, however, give the CAFC, in contravention of *Universal Camera*, license to review something less than the whole record; nor does it justify the CAFC's failure to afford the ALJ's factual findings the deference to which they are entitled under that decision. The CAFC's patent expertise does not and should not entitle the CAFC to avoid having to follow the rules of appellate review.

Respondents also avoid Qume's central argument by asserting for the first time that only issues of law, and not disputed factual findings, were decided by the International Trade Commission and were before the CAFC.[2] There is no question that

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review. The effect of the CAFC's erroneous decision in this regard is serious in that it impairs the statutory presumption of patent validity which, until this decision, could only be rebutted by "clear and convincing evidence". One illustration of the pernicious effect of this failure to insist on clear and convincing evidence is the CAFC's acceptance of the Commission majority's finding of anticipation as to Claim 8, even though it was based on uncorroborated testimony which would be insufficient as a matter of law in a federal district court proceeding (see Petition at 6-8).

[2] Private respondents and the International Trade Commission both place emphasis on the fact that the Commission's review of an ALJ's findings is not analagous to a court of appeals review of a district court's decision, but rather is a "de novo proceeding". Their observation, which would be true of virtually all agencies, is correct but totally *irrelevant* to Qume's argument. This is made clear by such cases as *Jackson v. Veterans Administration*, 768 F. 2d 1325, 1329 (Fed. Cir. 1985) where the proceeding before the agency from whose decision appeal was taken to the CAFC was viewed by the CAFC as "de novo [in] nature. . . "; yet, *Universal Camera's* mandate concerning appellate review was followed by the CAFC in *Jackson*.

Qume's appeal to the CAFC sought, and the CAFC provided, a review of factual findings. At the outset of its decision, the CAFC expressly stated that its affirmance was based on its conclusion that "the ITC applied the correct legal standards and its findings underlying these rejections are supported by substantial evidence" (App. 2). In a footnote to the above statement, the CAFC proceeded to describe the "substantial evidence" test of appellate review pursuant to which "a factual finding of the Commission can be overturned ..." (App. 5, fn. 1). The CAFC then proceeded in the body of its opinion to cite to the testimony of specific witnesses and to findings by the Commission of "insufficient evidence" and "evaluation of ... evidence" by the Commission. The CAFC unquestionably was engaged in a review of factual findings.[3] The CAFC's failure to utilize the *Universal Camera* standard of appellate review when engaging in this review clearly warrants the granting of Qume's petition.

Respondents also are incorrect when they see a "consistency of approach" in the CAFC's decisions and, based thereon, conclude that patentees will not be discouraged from resorting to the ITC under 19 U.S.C. § 1337.[4] As a review of the CAFC

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[3] It is significant that the International Trade Commission repeatedly acknowledges in its opposing brief to this Court that the CAFC was reviewing factual findings. Moreover, even private respondents, in their brief to the CAFC, repeatedly referred to the factual findings and the "substantial evidence" test. These admissions are compelled by the record, which unquestionably reflects factual disputes. For example, the issue in dispute on Claim 8 was whether the invention had been anticipated by an earlier system. The evidence on this issue consisted of disputed testimony (uncorroborated in respondents' case) which necessarily involved an evaluation of credibility by the ALJ. It is thus difficult to understand how the International Trade Commission can contend that "[t]he Commission did not. . . reject the ALJ's findings based upon a contrary evaluation of testimonial evidence." (ITC Brief at 10, fn. 10). It is instructive, in that regard, that Commissioner Leibeler analyzed specific testimony and evidence in her dissent and concluded that respondents had in important respects "failed to present sufficient evidence to overcome their burden of proof. . . ." (App. 77-99).

[4] This is a case involving many large foreign companies (as respondents or licensees) and technology that has had a major impact on the workplace.

(Footnote Continued)

cases applying *Universal Camera* cited in Qume's Petition makes clear, the CAFC has in the past repeatedly engaged in careful evaluation of "the record as a whole" in reviewing the factual findings of an administrative agency. This painstaking review in other cases can hardly be viewed as "consistent" with the CAFC's cursory and uncritical review in this case.

Qume stands as a doubly victimized company. First, after playing a leading role in creating a new U.S. industry in the 1970's, Qume has fallen prey to foreign infringers who have misappropriated its technology and, through a flood of imports, have turned a flourishing American company of over three thousand employees into a skeleton one fifth that size. Second, it has been made the victim of agency and judicial decision making that is based not on proper review of a factual record, but on an unsupportable substitution of judgment by a bare majority of the International Trade Commission and a rubber stamping by the CAFC. Denied the presumption of patent validity by the Commission and the right to effective appellate review by the CAFC, Qume now looks to this Court to save from destruction valuable property rights worth tens of millions of dollars as well as many American jobs. The significance of this case goes well beyond Qume's own situation and extends to other patent owners who appear before the International Trade Commission to obtain relief from foreign unfair competition or who seek redress from the CAFC in connection with a decision by the Commission.

It is difficult to see, under such circumstances, how the International Trade Commission can seriously argue that this case will have no impact on other patentees simply because it is unreported (ITC Brief at 11).

CONCLUSION

The approach adopted by the court below violates controlling precedents of this Court which establish the governing standard of appellate review. If uncorrected, it will seriously diminish both the presumption of validity statutorily provided to patentees and the usefulness to patentees of the International Trade Commission as an alternative, cost-effective forum. This petition should accordingly be granted.

Respectfully submitted,

JOHN E. KIDD
(Counsel of Record)
JOHN E. DANIEL
NICHOLAS L. COCH
ANDERSON RUSSELL KILL
& OLICK, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700
Attorneys for Petitioner
Qume Corporation

Of Counsel:

RALPH S. SPRITZER
College of Law
Arizona State University
Tempe, Arizona 85287
(602) 965-7419

and

MICHAEL J. CRONIN
25 Fox Hedge Road
Colts Neck, New Jersey 07722
(201) 946-3277

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